Appendix

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9237

J. E. Riley Investment Company (a corporation), Harry P. Sheppard, and Harry Donnelley,
Appellants.

vs.

Walter Sakow,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Division Four.

Before: Denman, Mathews and Healy, Circuit Judges.

Healy, Circuit Judge.

The appeal is from a judgment of the District Court for the Territory of Alaska in favor of appellee (plaintiff) in a suit in ejectment and for damages. The verdict and judgment ran against appellants jointly.

The property involved is the Good Hope placer claim, alleged to have been located by appellee in 1930. The amended complaint sets up the title of

appellee, subject to paramount title in the United States, and alleges that the defendants (appellants) unlawfully and in bad faith entered upon the claim and extracted gold therefrom. Appellants filed a joint answer denying generally the averments of the complaint and alleging as an affirmative defense for all of them that the portion of the Good Hope placer from which the values were extracted was included within the boundaries of the North Star and Bluebird claims, allegedly located by appellant Sheppard prior to the location of the Good Hope and held under lease from Sheppard by appellant Riley Investment Company.

Appellant Donnelley was the superintendent of the Investment Company and the operator of its dredge. Appellant Sheppard was vice-president, secretary, and a director of that company, and was a business associate of Donnelley at the town of Flat, located a short distance from the scene of the operations. The proof tended to show that in September, 1934 appellee found the Investment Company's dredge working on the Good Hope and immediately protested to Donnelley and Sheppard. Thereafter he posted trespass notices on his claim. The dredging operations, however, continued until the freeze-up in November, 1934, by which time some $45,000 in placer gold had been extracted from the Good Hope.

Motions for a nonsuit and for a directed verdict were made on behalf of appellants Donnelley and Sheppard on the ground that neither was in the actual possession of the property. The motions were denied and the rulings are assigned as error. During the progress of the trial Donnelley and Sheppard unsuc-

cessfully sought leave to file separate answers, the former for the purpose of disclaiming any right or interest, and the latter for the purpose of denying possession in himself.

The claimed error in these respects is predicated on the territorial statute, §3761 Compiled Laws of Alaska 1933, requiring that actions to recover possession of real property "shall be commenced against the persons in the actual possession of the property".[1] It is argued that the Investment Company was shown to have been in exclusive actual possession under a written lease from Sheppard, hence neither Sheppard nor Donnelley was a proper party defendant. The argument necessitates some further inquiry into the condition of the record.

The precise whereabouts of the Bluebird and North Star claims which Sheppard was said to have located were not conclusively established.[2] The jury may well have believed that, as originally staked on the ground, there was no conflict or overlapping between either of these claims and the Good Hope. There was evidence that as early as 1932 and 1933 Donnelley was familiar with the Good Hope claim, and that appellee had sampled it at Donnelly's suggestion with the view of its possible acquisition or lease by the Investment Company. Donnelley at that time made no claim that the ground was covered by Sheppard's locations, notwithstanding the latter were said to have been then under lease to his company.

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1. The statute provides that any person with a legal estate in real property and a present right of possession "may recover such possession with damages for withholding the same", etc.

2. Some of the proof tended to show, also, that these locations were invalid.

In connection with the subsequent invasion of the Good Hope, there are circumstances warranting the belief that there was a concert of action among all three appellants. Sheppard, under his own version of the matter, had a royalty interest in the recovery, and there is some evidence that Donnelley represented him at the cleanups. The gold extracted from the Good Hope was taken by Donnelley and placed in his bank at Flat. It is inferable that Donnelley, who was the chief actor, was agent not alone for the Investment Company but for Sheppard as well. In this posture of the evidence it was not error to refuse to instruct a verdict for the individual defendants. 63 C.J. 936.

In denying the motion for leave to file separate answers during the progress of the trial, the court called attention to the fact that the case had been at issue for some years and had previously been three times tried. Also, that the individuals had defended jointly with the corporation throughout the course of the litigation and had sought to justify on the basis of the claimed locations of Sheppard. The court concluded that it was too late for appellants to do otherwise than "stand or fall" on their joint defense. The application for leave to plead separately was addressed to the sound discretion of the trial court, and under the circumstances we find no reversible error in the denial of the application.

There was a motion for a directed verdict in favor of all the defendants, bottomed on the asserted invalidity of the certificate of location of the Good Hope. The denial of the motion is assigned as error.

The argument in this respect is that the certificate failed to describe the claim with reference to some natural object or permanent monument, as required by the territorial statute. Ch. 10, Session Laws Alaska 1915.

The case was heretofore before this court on an appeal from an earlier judgment, 98 F. (2d) 8. The certificate is set out verbatim in our opinion on that appeal. The claim is described as being situate on the right limit of Otter Creek, a tributary of the Iditarod River, Otter Recording Precinct. This as the evidence shows is a featureless locality. There was testimony that the initial stake of the Good Hope measured about six by eight inches from top to bottom and had been blazed on four sides. It was four or five feet in height above the surface and was firmly embedded in the ground, so firmly that it had remained in place from the inception of the location to the time of the trial in 1938. The same is true of post No. 2. Both posts were plainly visible from the valley of the creek and each bore appropriate markings.

The jury were instructed that a post or stake may be a permanent monument sufficient to satisfy the legal requirement as to identification, provided it is of a substance fairly permanent, is firmly planted in the ground, and can be readily seen and identified by a person honestly seeking to find the claim. The court left for the determination of the jury the question whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument. This was proper, and the instructions given on the subject were correct. Hammer v. Gar-

field M. & M. Co., 130 U.S. 291; Bismark Mountain Mining Co. v. North Sunbeam Co., 14 Idaho 516, 95 P. 14; Credo Mining Co. v. Highland M. & M. Co., 95 Fed. 911; Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 666-679.

Error is predicated on the overruling of objections to testimony of appellee concerning the conduct and declarations of Donnelley while negotiating with him for prospecting and leasing the Good Hope claim. The argument is that the testimony was in derogation of Sheppard's title and was inadmissible as against Sheppard. This may be conceded for the purpose of deciding the point. The question of title was not the sole issue, however. Also involved was the question of bad faith. The jury were at liberty to find against one or more of the defendants on this issue and to absolve the others of an intentional trespass. They were so charged by the court. On the issue of *mala fides* the testimony was clearly admissible as against both Donnelley and the Investment Company. There was no request for an instruction limiting the evidence to its appropriate purpose, and the point must be deemed waived. §3591, sub. 5, Compiled Laws of Alaska 1933; Wigmore on Evidence (2d Ed.), §13, pp. 159, 160.

These were the principal questions urged in briefs and oral argument. Other errors were assigned, but we find none warranting a reversal.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 14, 1940. Paul P. O'Brien, Clerk.

Due service and receipt of a copy of the within is hereby admitted

this_____day of June, 1940.

_____

_____

Attorneys for Respondent.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

FILED
JUL 10 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1939

No. 127

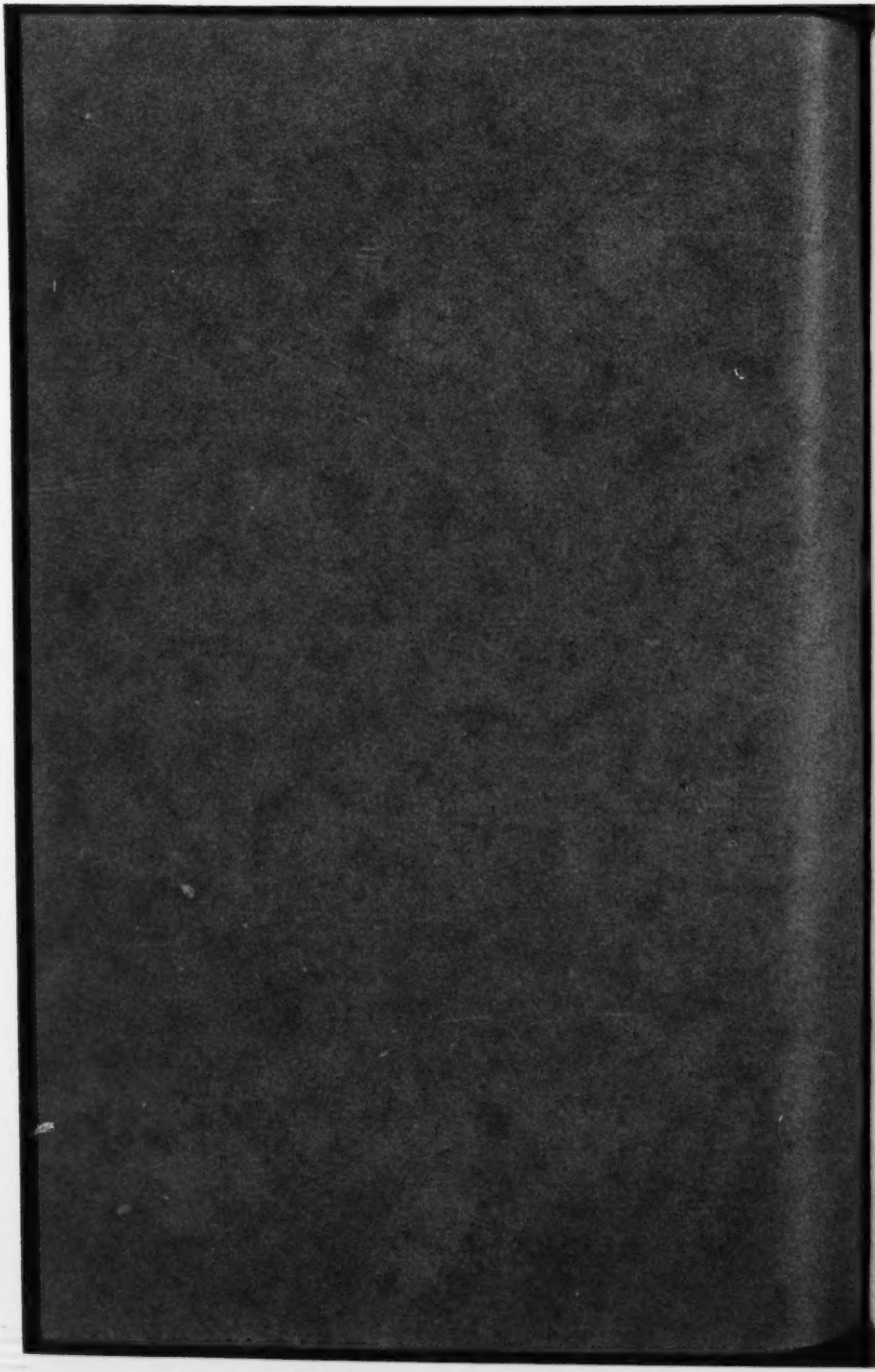
J. E. RILEY INVESTMENT COMPANY (a corporation), HARRY P. SHEPPARD and HARRY DONNELLEY,
Petitioners,

vs.

WALTER SAKOW,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CECIL H. CLEGG,
Fairbanks, Alaska,
HERMAN WEINBERGER,
Merchants Exchange Building, San Francisco, California,
Attorneys for Respondent.



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vs.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT.

The respondent, Sakow, as plaintiff in the District Court for Alaska, recovered judgment (on a verdict) against the defendants (petitioners here) from which they appealed to the United States Circuit Court

(NOTE): All italics ours, unless otherwise indicated.

of Appeals, Ninth Circuit. The judgment was reversed because of errors in instructions, and the case sent back for new trial. (98 F. (2d) 8) (July 5, 1938.) This is hereinafter referred to as the "first appeal".

On new trial, Sakow again was successful and from the judgment (again on a verdict) in his favor petitioners appealed to the Circuit Court of Appeals, which affirmed the judgment. (110 F. (2d) 345) (March 14, 1940.) This is hereinafter referred to as the "second appeal".

It is to review the decision and opinion rendered and given on the "second appeal" that petitioners are before this Court. (Pet. 2.)

II.

ARGUMENT.

1. The Petition Confuses the First and Second Appeals.

The immediate impression gained from reading the Petition herein is one of confusion. This is augmented rather than cleared by the statement of questions which the Petition presents to this Court (Pet. 5-6):

> "The questions sought to be reviewed by this petition are first: Is a certificate of location that describes a placer mining claim, as:
>
> " 'being from this initial stake 1320 feet down stream to post no. 2. thence 660 feet cross the creek to post no. 3 thence 1320 feet up stream to post no. 4. thence 660 feet back to this Initial Stake.
>
> " 'this claim is situated on the right limit of Otter creek a Tributary of Iditarod River Otter recording precinct fourth division Territory of Alaska, to be known 'Good Hoppe' claim. (R. 52),
>
> "sufficient to meet the requirements of Sec. 2324, Revised Statutes of the United States, which provides, that:
>
> " 'All records of mining claims * * * shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim.'?
>
> "Second: May a subsequent locator intrude and trespass upon a placer mining claim in the actual possession of another, under claim and color of title, and make his wrongdoing successful, by

asserting 'flaws' in the title of the one against whom the wrong has been, by him, committed?"

As to the "first" question—the sufficiency of Sakow's Certificate of Location—the facts on which its sufficiency is based were found in his favor by the jury in the District Court. Furthermore, its validity in law is not based solely on Section 2324 of the *Revised Statutes of the United States,* as the above "first" question would seem to imply, but principally on a Territorial Statute which supplements the former. (*Session Laws of Alaska 1915* Ch. 10. See Appendix to this Brief.)

As to the "Second" question, it is made to appear from its context that Sakow trespassed and intruded upon the claims of petitioners. As a matter of fact, petitioners trespassed on Sakow's claim, the Good Hope,[1] and in his action of ejectment against them, they sought to defend by showing that his Certificate of Location was not valid and that in locating his Good Hope claim he had included within it a part of their Blue Bird and North Star claims. These matters were resolved against them by the verdict and judgment. (R. 16.)

To further increase the confusion, petitioners now specifically attack the decision and opinion of the Circuit Court of Appeals given on the *first appeal,* as to the validity of Sakow's Certificate of Location,

1. The Circuit Court of Appeals, in its opinion on the second appeal (Appendix to the Petition p. iv), and reported in 110 F. (2d) 345, refers to the trespass as "the subsequent invasion of the Good Hope".

even though their Petition does not seek to have it reviewed.[2] (Pet. 11-16.) They now discuss this matter at great length,[3] but at the time the decision came down (first appeal, July 5, 1938) they entered no objection whatever to it; they did not move to modify it, nor did they file a petition for rehearing. As a matter of fact, they accepted all of the benefits of the decision which they now repudiate. It awarded them a new trial, which was had, but now that the verdict and judgment have gone against them, and this time were affirmed by the Circuit Court of Appeals, they boldly assert that the Court, on the first appeal, should not have ordered a new trial and should not have ordered submitted to the jury the issue as to the sufficiency of Sakow's Certificate of Location; that in so doing, the Court erred. (Pet. 11.)

2. The Petition is specific. It says: "Petitioners pray that a Writ of Certiorari issue to review *the judgment* of the Circuit Court of Appeals for the Ninth Circuit *entered into the above entitled cause on 14th day of March, 1940;*" i. e., the *second appeal.* Pet. 1.)

3. Counsel consume approximately eighteen pages of the thirty page Petition herein and all of the supporting Brief in a discussion of the validity of Sakow's Certificate of Location. The "Second" question presented by the Petition is abandoned entirely in the supporting Brief.

2. The Validity of Sakow's Certificate of Location Was Res Judicata and Stare Decisis on the New Trial.

It is obvious that the decision and opinion of the Circuit Court of Appeals given on the first appeal of this case (98 F. (2d) 8) as to the validity of Sakow's Certificate of Location, involving the same parties and the same subject matter, was *res judicata* and *stare decisis,* absolutely binding upon the District Court on the new trial.

In that decision the Court used this precise and lefinite language:

> "The 'stake' and 'posts' referred to in the claim may or may not be permanent monuments and it was for the jury to determine their permanency from the evidence produced. * * *
>
> "We hold that, otherwise than in the absence of a description of one of the stakes as a permanent monument, which may be shown at the trial, the plaintiff's certificate of location is valid in form and content."

When the case was tried anew, evidence was introduced as to the permanency of the stakes. The question whether any of the stakes constituted a permanent monument was left to the jury, which resolved it in Sakow's favor. (R. 15.)

When the matter reached the Circuit Court of Appeals on the *second appeal* (110 F. (2d) 345), that Court, in commenting on the evidence relating to this phase of the case, referred to the right limit of Otter Creek, where Sakow's Good Hope claim is situated, and said:

"This as the evidence shows is *a featureless locality.* There was testimony that the initial stake of the Good Hope measured about six by eight inches from top to bottom and had been blazed on four sides. It was four or five feet in height above the surface and was firmly imbedded in the ground, so firmly that it had remained in place from the inception of the location to the time of the trial in 1938. The same is true of post No. 2. Both posts were plainly visible from the valley of the creek and each bore appropriate markings.

"The jury were instructed that a post or stake may be a permanent monument sufficient to satisfy the legal requirements as to identification, provided it is of a substance fairly permanent, is firmly planted in the ground, and can be readily seen and identified by a person honestly seeking to find the claim. *The court left for the determination of the jury the question whether any of the stakes mentioned in the location certificate of the Good Hope constituted a permanent monument. This was proper, and the instructions given on the subject were correct.*"[4]

Thus, the trial court followed the "law of the case" as laid down by the Circuit Court of Appeals on the *first appeal,* which it affirmed again on the second appeal.

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4. The Court here cited, among other cases, *Hammer v. Garfield M. & M. Co.,* 130 U. S. 291. In their Brief (p. 46), supporting the Petition herein, counsel set forth a long quotation from the *Hammer* case, but they significantly omit the following language which this Court used in that case and which precedes the part they quoted: "These provisions as appears on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. *Of course this section means, when such reference can be made.*"

The petitioners were fully aware that on new trial they were bound by the "law of the case" as set forth in the opinion of the Circuit Court of Appeals on the first appeal. In their Brief, filed in the Circuit Court of Appeals on the second appeal, at page 46, they make the following statement:

> "This court, on the former appeal, held that this notice 'is valid as to form and content', 'otherwise than in the absence of a description as to one of the stakes as a permanent monument, which may be shown at the trial' (98 F. (2d) 8, 11).
>
> *"We take it that the court's former opinion is 'the law of the case', and that the question of the sufficiency of the notice 'as to form and content' is not open to consideration. That the only question that can now be considered is as to whether 'one' of the stakes mentioned in the notice is a permanent monument* within the meaning of the law that requires the record to refer to a permanent monument 'as will identify the claim'.
>
> "The determination of this question depends upon the nature of the posts and stakes mentioned in the notice. The evidence discloses * * *"

It is obvious that petitioners have now abandoned the position they lately took in the Circuit Court of Appeals. There, they were ready to argue and submit as

> "the only question that can now be considered * * * whether one of the stakes is a permanent monument * * *"

Now, for the purposes of their Petition, they challenge the right of the Circuit Court of Appeals to have ordered that question submitted to the jury and here they assail its action as error.

The fact of the sufficiency of the stakes, any one of them, to constitute a permanent monument was found in favor of Sakow and against the petitioners by the District Court and the Circuit Court of Appeals. This Court has repeatedly held

> "that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous."
>
> *The Germanic,* 196 U. S. 589;
>
> *Wafferman v. The Carib Prince,* 170 U. S. 655.

3. In Any Event Sakow's Certificate of Location Is Sufficient in Fact and Valid in Law.

Sakow's Certificate of Location, in any event, in fact and in law, is valid and sufficient. Its validity is determined by the appropriate provisions of the applicable Territorial law of Alaska and not by the general mining enactments of Congress.

It is obvious that petitioners' reference to Section 2324, *Revised Statutes of the United States,* is to inject a "Federal question" into the case so as to give some semblance of a basis for their Petition for Certiorari. They set forth the provisions of this Section relating to the "records" of mining claims, but in doing so they are somewhat careless in the citation and in the use of quotation marks. The Statute, quoted at the bottom of page 6 and the top of page 7 of their Petition, is from Section 22 and not Section 28 of Title 30, *U. S. C. A.* Furthermore, Section 22 does not commence with the words "All valuable mineral deposits", as they quote it, but with the words "*Except as otherwise provided* all mineral deposits * * *".[5] Nor is the quotation which appears in italics at the bottom of page 7 of their Petition correct. It purports to be from *U. S. C. A.* Title 30, Section 28, p. 151, and it includes, as quoted words, the following:

"when required by local rules or customs"

These words, however, are not a part of Title 30, Section 28, *U. S. C. A.*

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5. The complete Section appears in the Appendix to this Brief.

This enactment of Congress (R. S. Sec. 2324, Title 30, *U. S. C. A.* Sec. 28) is the basis for later Territorial Statutes. If these Statutes require a certificate of location to be recorded, then the recorded certificate "shall" contain the matters set forth in Section 28. That this is well known to counsel appears from their Petition for Rehearing, filed in the Circuit Court of Appeals after the decision on the second appeal. They say (p. 8):

> "*The Congressional Mineral Laws of the United States do not in terms require a certificate or notice of location to be recorded. It is only when such certificate or its equivalent is required to be recorded by state or territorial laws or local rule that the provisions of the Federal law become mandatory.* And when the state or local laws or rules require a record to be made it must contain at least the elements provided for by Sec. 2324, Revised Statutes, and if such state or local laws prescribe the contents of the recorded notice, it must comply with this additional requirement."

In line with this, counsel likewise well know that the Territorial Law in effect when Sakow located his Good Hope claim (Oct. 27, 1930; i. e., the *Act of 1915*) *did not require* a certificate of location to be recorded. Therefore, their statement in this regard, as well as their argument supporting it, is misleading:

> "In Alaska, therefore, the recording of a certificate of location is an essential act of location and mandatory; and, failure of the certificate, to reasonably comply therewith, invalidates the location." (Pet. 9.)

Under the 1915 Act (Appendix) the recording of a certificate of location is *permissive and directory but not mandatory.* The language of the Act is:

> "A failure to record a certificate of location of claim as herein provided shall operate as and be deemed abandonment thereof, and the ground so located shall be open to re-location; provided, that if a full compliance with the preceding provisions of this act shall have been made before any location by another, such compliance shall operate to prevent the abandonment or forfeiture of such claim and save the rights of the original locator."

Thus, it will be noted, failure to record such certificate is deemed an abandonment only if, before the certificate is recorded, another person performs all of the acts of location by a full compliance with the Statute. There is no evidence anywhere in the Record of any attempted location of the Good Hope *subsequent* to Sakow's location October 27, 1930.[6] Therefore, the recording by Sakow of his Certificate of Location was not an essential nor a necessary step for him to take to completely perform his act of locating the Good Hope.

In 1931 the Territorial Legislature repealed the *Act of 1915.* (*Session Laws of Alaska 1931* Ch. 64.) Thereafter there was no territorial law making the recording of a location certificate either a directory or mandatory step in locating a claim, nor was there

6. Petitioners claim to have located their North Star and Blue Bird claims on July 6, 1926, and that Sakow's later Good Hope location overlapped their claims.

any act of Congress, relative to Alaska, requiring the locator of a mining claim to record a certificate of location.

Therefore, under the law in effect (*Territorial Act of 1915*) when he located the Good Hope, Sakow had a right to record a location certificate at any time before there was an intervening location by another person, and since there never was such an intervening location, that right continued until the 1915 Act was repealed in 1931. Thereafter, only the general laws of the United States governed, and since those laws did not require, as a necessary part of the act of location, the recording of a certificate of location, Sakow could have proceeded to trial without ever having recorded his Certificate of Location. This was clearly stated by the trial judge in his opinion denying the Motion for New Trial. (R. 391 et seq.)

As a matter of fact Sakow did record his Certificate (R. 53) and because he did so, even though under the law in effect at that time it was not mandatory, petitioners now seek to invoke Section 2324 *R. S.* and its provisions as to what a recorded certificate must contain in those cases where a local law *requires* the certificate to be recorded.

In this connection, also befogging the issue, is another misleading assertion by counsel, relating to the *Territorial Act of 1913.* (*Session Laws of Alaska 1913* Ch. 74.) They say:

> "This Act, inter alia, required certificates of locations of mining claims to be recorded and prescribed their content. *The Act was substan-*

> *tially the same as the Act of 1915,* by which, in conjunction with Sec. 2324, Revised Statutes, the validity of appellee's certificate of location must be tested." (Pet. 20.)

It is true that the *Act of 1913* required certificates of location to be recorded, but it is a misstatement to say that this Act "was substantially the same as the Act of 1915", which we have shown, supra, made no such requirement.

Furthermore, petitioners, with admitted knowledge of the situs of Sakow's Good Hope claim, could not have been misled by any imperfections in his recorded Certificate of Location even if such imperfections existed. (*Butte and Superior Copper Co. v. Clark-Montana Realty Co., et al.,* 249 U. S. 27; *Yosemite Mining Co. v. Emerson,* 208 U. S. 25.) Donnelley, one of the petitioners, was on Sakow's Good Hope claim four or five times when he requested Sakow to sample it with the view of its possible acquisition or lease by another of the petitioners, Riley Investment Company, if the samples showed sufficient values. (R. 182-187.) It is obvious that the markings, corners, stakes, dimensions and extent of Sakow's claim were well known to the petitioners.

Also, as to petitioners, there is the question of bad faith to be considered. This is mentioned in the opinion of the Circuit Court of Appeals on the second appeal (Appendix to Petition) where the Court says:

> "In connection with the subsequent invasion of the Good Hope, there are circumstances warranting the belief that there was a concert of

action among all three appellants. Sheppard, under his own version of the matter, had a royalty interest in the recovery, and there is some evidence that Donnelley represented him at the cleanups. The gold extracted from the Good Hope was taken by Donnelley and placed in his bank at Flat. It is inferable that Donnelley, who was the chief actor, was agent not alone for the Investment Company but for Sheppard as well. * * *

"The question of title was not the sole issue, however. *Also involved was the question of bad faith.* The jury were at liberty to find against one or more of the defendants on this issue and to absolve the others of an intentional trespass. They were so charged by the court. On the issue of mala fides the testimony was clearly admissible as against both Donnelley and the Investment Company."[7]

The petitioners knew the situs of Sakow's Good Hope claim, and have never claimed, and make no contention now, that the lines of his claim were not "distinctly marked on the ground so that its boundaries can be readily traced" as required by the provisions of Title 30 *U. S. C. A.* Section 28. Their sole contention seems to be that he was required to record a certificate of location and that such recorded certificate does not show that the claim was tied to any permanent monument or natural object, as required by the *Territorial Act of 1913.* We have shown, supra, that the 1913 Act has no application whatever to

7. It is significant also that the Record may be searched in vain for the testimony of Donnelley "who was the chief actor". He did not offer himself as a witness in the proceedings.

Sakow's recorded Certificate and that under the applicable *Territorial Act of 1915* a recorded certificate of location was not required, and that the jury decided in Sakow's favor, that one or more of his stakes constituted a "permanent monument".

The "first" matter, therefore, which the Petition herein seeks to have reviewed, does not pose a Federal question, substantial or otherwise.

4. Petitioners Trespassed on Sakow's Good Hope Claim. He Did Not Trespass on Their Blue Bird or North Star Claims.

The "Second" question which the Petition herein seeks to have reviewed (Pet. 6) they have abandoned and not mentioned in the Brief supporting the Petition. The question is so phrased, it is made to appear therefrom that Sakow intruded and trespassed upon the claims of petitioners. The reverse is true. The situs of Sakow's Good Hope claim, as before stated, was well known to them and was not challenged. The exact situs of the Blue Bird and North Star claims, however, was not definitely known nor proved, and this fact was noted by the Circuit Court of Appeals in its opinion on the second appeal. The Court says:

> "The precise whereabouts of the Blue Bird and North Star claims which Sheppard was said to have located were not conclusively established.[8] The jury may well have believed that, as originally staked on the ground, there was no conflict or overlapping between either of these claims and the Good Hope."

Obviously, if there was no overlapping, then Sakow was not trespassing on petitioners' claims.

In commenting on the trial court's refusal to instruct the jury as to one phase of Sakow's alleged trespass on their claims, petitioners say:

> "The only allusion, by the Circuit Court of Appeals to this vital question, is the statement 'Other

8. "Some of the proof tended to show, also, that these locations were invalid."

> errors were assigned but we find none warranting a reversal'." (Pet. 27.)

This statement is misleading because reference to the Court's opinion (found in the Appendix to the Petition), shows that it is only half of what the Court actually said, which was as follows:

> *"These were the principal questions urged in briefs and oral argument.* Other errors were assigned, but we find none warranting a reversal."

As in their Brief and on oral argument before the Circuit Court of Appeals, so in their Brief supporting their Petition here, petitioners abandoned the point which is the "Second" question the Petition asks this Court to review.

III.

CONCLUSION.

The jury, in awarding the verdict to Sakow, found him to be the owner of the Good Hope claim, as described in the amended Complaint; that the petitioners trespassed thereon; that he is entitled to recover damages for such trespass and the taking of gold therefrom. (R. 15.) The jury also inferentially found one or more of the stakes of the Good Hope claim to constitute a permanent monument, and that Sakow was not a trespasser on petitioners' claims.

Thus, neither of the matters which the Petition seeks to have reviewed herein presents a question cognizable by this Court in these proceedings, and the Petition should be denied.

Dated, San Francisco, California,
July 6, 1940.

Respectfully submitted,
CECIL H. CLEGG,
HERMAN WEINBERGER,
Attorneys for Respondent.

(Appendix Follows.)